Supreme Court, U.S.
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CLERK

86-2042

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIMMY L. STANDLEY; SHARON STANDLEY; SUCABA ENTERPRISES; AERI TRUST ORGANIZATION; MOGOLLON TRUST ORGANIZATION; MULE CREEK TRUST ORGANIZATION; EUGENE A. BURNS; LINDA H. BURNS; SHELDON C. DEAL; NEW LIFE HEALTH CENTER; JOHN F. DEMENT; MARGARET A. DEMENT; LIFE HEALTH SERVICES; GEORGE C. CLAPP, JR.; MARGARET CLAPP; GOWING ENTERPRISES; DOUBLE D DONUTS,

Petitioners,

v.

UNITED STATES TAX COURT,

Respondent,

v.

COMMISSIONER OF INTERNAL REVENUE,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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38 pp

QUESTIONS PRESENTED

1. Does a conspiracy by the Executive Branch of Government to compel taxpayers to litigate their tax dispute in the Tax Court and prevent them from litigating in a federal district court violate those taxpayers' personal rights protected by Article III's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States?

2. Are taxpayers entitled to a stay of non-jury proceedings in the Tax Court if those proceedings would collaterally estop the exercise of the right to have the same factual issues decided by a jury in proceedings pending in federal district court?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIMMY L. STANDLEY; SHARON STANDLEY; SUCABA ENTERPRISES; AERI TRUST ORGANIZATION; MOGOLLON TRUST ORGANIZATION; MULE CREEK TRUST ORGANIZATION; EUGENE A. BURNS; LINDA H. BURNS; SHELDON C. DEAL; NEW LIFE HEALTH CENTER; JOHN F. DEMENT; MARGARET A. DEMENT; LIFE HEALTH SERVICES; GEORGE C. CLAPP, JR.; MARGARET CLAPP; GOWING ENTERPRISES; DOUBLE D DONUTS,

Petitioners,

v.

UNITED STATES TAX COURT,

Respondent,

v.

COMMISSIONER OF INTERNAL REVENUE,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, by and through counsel William A. Cohan and Darold W. Killmer of the law firm of Cohan, Greene & Killmer, petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Neither of the dispositions below have been accompanied by written opinions, nor have they been published. The orders denying petitioners relief are found in Appendices A and B to this petition, *infra.*

JURISDICTION

The Order of the court of appeals was entered on March 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Title 26 U.S.C. sections 161, 162, 163, 164, 165, 166, 167, 6213, 7422 and 7442, and Title 28 U.S.C. section 1346 are set out in the statutory appendix, Appendix C, *infra*.

STATEMENT

1. In the late 1970's, petitioners joined an organization known as American Law Association ("ALA"). The ALA promoted the establishment of unincorporated business organizations designed to limit personal liability, facilitate estate planning, ensure continuity of business structure, expand business opportunities and profit potential, and legally reduce tax liability.

In 1978, the Internal Revenue Service ("IRS") launched an extensive civil and criminal investigation into the affairs of ALA, its founder Karl Dahlstrom, and others. According to internal memoranda, the IRS was concerned that the tax shelters advocated by Dahlstrom, if allowed to continue to exist, would jeopardize effective tax collection. Accordingly, Dahlstrom's case was referred for criminal prosecution in hopes of establishing "precedent setting case law." (IRS Request to Justice Department for Grand Jury Authorization, November 9, 1979, p. 11). The IRS determined that "a successful prosecution will have a positive effect, nationwide, on tax administration and compliance. . . ." *id.*, and that "[i]f this program is allowed to continue without strong action by the IRS, the results on voluntary compliance could be disasterous [sic]." *Id.*

Aimed at attaining a definitive determination of the invalidity of the tax program Dahlstrom had developed,

the IRS devised a two-pronged attack. Initially, Dahlstrom and others were indicted for violating 18 U.S.C. Section 371 and 26 U.S.C. section 7206(2). Although Dahlstrom was convicted at trial, the Ninth Circuit Court of Appeals reversed his convictions, holding that a criminal proceeding "is an improper vehicle for pioneering interpretations of tax law." *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983). In so holding, the Ninth Circuit noted that "[w]e are convinced that the legality of the tax shelter program advocated by the appellants in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment." *Id.*

The other prong of the IRS's attack on the Dahlstrom program was manifested in the civil arena as part of the Service's "Illegal Tax Protestor" program. The goal of the IRS was to hit hard and to hit fast, with an eye toward "maximum impact". The Service determined that the Tax Court provided the most friendly forum in which to litigate the merits of the Dahlstrom program. Accordingly, the Service manipulated and falsified the facts of the tax deficiencies of petitioners herein to force them into the Tax Court (an Article I forum, but formerly an "independent agency in the Executive Branch of Government," under 26 U.S.C. 7441), and prevent them from paying the deficiency and suing for a refund in the United States District Court (an Article III forum).

> In order to get the cases before the Tax Court, we deliberately, with counsel's concurrence, pressed these cases through the examination and issued statutory notices without using our summons power to obtain the records necessary for trial. We did so because we feel our best weapon against this scheme is a Tax Court case exposing this scheme and upholding the Service's position.

Letter from Melvin L. Joseph, Seattle District Director, to Assistant Regional Commissioner (Examination), Western Region, dated October 6, 1980, p. 3.

The only way the IRS could assure a Tax Court determination rather than a federal district court (Article III) determination was to prevent the taxpayers from paying the deficiency and suing for a refund in district court. Accordingly, upon instructions, IRS examiners *disallowed all of the deductions* petitioners claimed on their federal income tax returns, even those deductions that are clearly allowable by the Internal Revenue Code, such as ordinary and necessary business expenses, interest, losses, bad debts, and depreciation. (Statutory Appendix C). Additionally, substantial *penalties* were imposed, as was *interest*, upon both the deficiency and the penalties. Finally, to ensure that the amount necessary to enter federal district court would be unpayable by the petitioners, the IRS assessed the now-inflated deficiency against the petitioners individually *and* against their business organizations. In short, the IRS chose the forum in which to litigate petitioners' tax liabilities.

As only one example of the effect of the IRS's strategy of falsely inflating petitioners' actual deficiencies, Petitioner Standley's case is instructive. After substantiation proceedings had concluded, the Service determined that the total deficiency for three years (1978-80) was $53,021.96. The cumulative Notices of Deficiency for those three years, however, totalled $791,511.89, nearly fifteen (15) times the true deficiency. Although the IRS itself believed the true deficiency was only fifty three thousand dollars, it would not use this figure if petitioners would not agree to immediately settle. Instead, if petitioners insisted on litigating the merits of their program, the IRS would use their admittedly grossly inflated deficiency figures, preventing petitioners from litigating in federal district court. In other words, if litigation was to occur, the IRS would ensure that it would take place in the Tax Court rather than in federal district court.

The accumulated amounts of the deficiencies which the IRS has assessed against petitioners has now exceeded twelve million dollars ($12,000,000.00). This amount far

exceeds both the amount petitioners have the ability to pay to bring an action in federal district court and the amount of any true tax deficiency. Thus, the IRS's strategy of forcing petitioners into the Tax Court has been successful.

2. Beginning in July of 1982, petitioners began petitioning the Tax Court for determinations of their tax liabilities. After a number of continuances occasioned by the Tax Court, the government, and petitioners, trial is now set to commence November 2, 1987.

3. On March 5, 1986, petitioners and others filed a civil action in federal district court in Colorado against various officers and agents of the Internal Revenue Service, alleging, *inter alia*, a conspiracy by the defendants to deprive petitioners of their right to an Article III forum in which to litigate their tax deficiencies. *Nordbrock, et al. v. Jensen, et al.*, No. CIV-86-687-PHX-CLH. The action was transferred to the District of Arizona. The government defendants filed three Motions to Dismiss, and the petitioners herein opposed those Motions, the latest opposition being filed on August 25, 1986. Since that time, nothing has happened in the district court. The conspiracy alleged in that Complaint, the conspiracy to force petitioners into an Article I forum by purposely and maliciously depriving them of the opportunity to litigate in an Article III forum, will be consummated if this Court does not stay the proceedings scheduled to commence in the Tax Court on November 2, 1987.

4. On January 30, 1987, Petitioners filed a Motion in the Tax Court for a continuance or stay of the tax court proceedings based upon the premise that the commencement of such proceedings would achieve the goals of the conspiracy: to violate petitioners' personal rights to separation of powers alleged in the federal district court action in Arizona. This Motion was denied on February 6, 1987.

5. On March 6, 1987, petitioners herein petitioned the Ninth Circuit Court of Appeals for a Writ of Prohibition and/or Mandamus to stay the trial proceedings in the Tax Court. The petition was denied by the Ninth Circuit panel on March 23, 1987.

REASONS FOR GRANTING THE PETITION

I. A CONSPIRACY BY THE EXECUTIVE BRANCH TO COMPEL PETITIONERS TO LITIGATE THEIR TAX DISPUTE IN THE TAX COURT VITIATES THE PERSONAL INTERESTS PROTECTED BY ARTICLE III'S GUARANTEE OF AN INDEPENDENT AND IMPARTIAL ADJUDICATION BY THE FEDERAL JUDICIARY OF MATTERS WITHIN THE JUDICIAL POWER OF THE UNITED STATES

Congress has developed a detailed and specific scheme in which tax disputes may be resolved. When the Internal Revenue Service determines that a taxpayer has a tax deficiency, it must notify the taxpayer of that deficiency. 26 U.S.C. 6212. At that point, the taxpayer has a choice of either paying the deficiency and suing the United States for a refund in federal district court (an Article III forum), 28 U.S.C. 1346(a), or litigating the merits of the deficiency without prepaying, but this option must be pursued in the Tax Court (an Article I forum), 26 U.S.C. 6213(a). It is well-established that this statutory scheme is constitutional. It is equally clear, however, that the congressional scheme assumes that the choice of forums in which the litigation will occur is the choice of the *taxpayer*, not the choice of the Internal Revenue Service.

In the present case, the IRS, an Article II entity, has consciously steered the tax dispute into the Tax Court, where it has determined that the odds of getting a favorable ruling are decidedly superior to the odds of prevailing in federal district court. The IRS has falsely inflated petitioners' true tax deficiencies by disallowing

all of their deductions. Allowance of itemized, ordinary and necessary business expenses is mandated by the Internal Revenue Code. 26 U.S.C. Secs. 161 and 162. In this manner, the Executive branch has violated the Constitution by encroaching upon the province of the Legislative branch by circumventing Congress' determination that the taxpayer shall choose the forum, and has also encroached upon the province of the judicial branch by effectively removing from its review a dispute which otherwise falls within the judicial power of the United States. Such circumvention of our system of checks and balances by the Executive branch is precisely the evil which our constitutional separation of powers is designed to prevent.

The strategy of the IRS was simple: To guarantee a Tax Court determination, the taxpayer must be prevented from paying the alleged deficiency and suing for a refund in federal district court. One method of preventing such a district court determination is to assess a deficiency in such an amount as to make it impossible, as a practical matter, to pay the assessed deficiency. Since a taxpayer must prepay the entire assessment in order to litigate in federal court, *see Flora v. United States*, 362 U.S. 145 (1960), all the IRS needs to do is make an extraordinarily large assessment. With prepayment made impossible, the taxpayer is left with but one "choice": the Tax Court.

Justice Blackmun has noted the options given to the taxpayer under the legislative scheme for tax disputes:

> The review of the statutory structure clearly reveals the following:
>
> The congressionally intended normal procedure is to allow the taxpayer, *if he desires it*, some "breathing space" prior to the exaction of the additional tax that is claimed. The avenue provided to accomplish this result is the route to the Tax Court where the issues,

> factual and legal, may be resolved prior to collection. This avoids the necessity of the taxpayer's disgorgement of funds, to his current financial detriment, even though he might ultimately prevail and recoup by refund all or a substantial part of the amount he pays. *The choices the taxpayer makes*, and the risks he assumes, by this route, include the foregoing of trial of the factual issues by a jury, having his trial before a specialist judge not assigned to the taxpayer's local district, and the accruing of interest on any deficiency ultimately redetermined, Sec. 6601(a), 26 U.S.C. Sec. 6601(a) (1970 ed., Supp. IV). *If he selects the other route*, that is, payment of the asserted deficiency, filing claim for refund, and suit, the taxpayer (*if he chooses the district court* rather than the Court of Claims) has his case tried before a United States district judge of his own district, with a jury available, and it is the Government, not the taxpayer, that bears the burden of accruing interest.

Laing v. United States, 423 U.S. 161, 197-98 (opinion of Blackmun, J., dissenting) (emphasis supplied).

Petitioners have alleged in the Tax Court, the District Court in the district of Arizona, and the Ninth Circuit Court of Appeals, that the IRS has intentionally assessed tax deficiencies in amounts grossly exceeding any true tax liability for the *express purpose* of preventing petitioners from litigating the validity of their program in federal district court, and for the *express purpose* of attaining a Tax Court determination of the legitimacy of the program.[1]

---

[1] It should be noted that petitioners have presented evidence that the IRS is indeed correct when it assumes that the Tax Court is a friendlier forum for attaining a determination favorable to the Government. A recent study indicates that while the taxpayer prevails on his claims in 33.8% of the cases in district court, the taxpayer wins only 6.3% of the time in the Tax Court. Study by the American Institute of Certified Public Accountants, 1985.

In this respect, this case is analogous to this Court's holding in *Steelman v. All Continent Corporation*, 301 U.S. 278 (1937). In *Steelman*, the Court granted certiorari and enjoined the prosecution of a suit in a federal court which had proper jurisdiction over the parties and the subject matter, but where the allowance of the proceedings to pass to a decree would crown a conspiracy to defraud the party seeking the injunction. In so doing, the Court recognized that allowing the proceedings to go forward would consummate the alleged conspiracy:

> All Continent Corporation, if there is truth in the charges made by the trustee, is a party to a conspiracy to cover up the bankrupt's assets and keep them from his creditors. In that view of the facts, the suit in Pennsylvania will be a step in fulfilling the conspiracy, and may even crown it with success.

Id., 301 U.S. at 285. The premise of the injunction was that if the proceedings were allowed to continue in the first court, there was a significant "danger that the issue to be tried may be so narrowly restricted as to shut out the light" on uncovering the alleged conspiracy. *Id.* The posture of the proceedings in *Steelman* is remarkably similar to the posture of the instant case.

> Whether they are innocent or guilty is a question not before us now. The data for formation of any opinion on the subject have not yet been supplied. At present our inquiry halts with the discovery of probable cause for preserving the estate from dismemberment or waste through a precipitate decision. If such cause has been made out, we think the court of bankruptcy has been armed with abundant power to preserve the status quo until there can be an adequate trial with all the necessary parties and a judgment on the merits.

Id., 301 U.S. at 288. Similarly, petitioners in this case seek the preservation of the status quo until a determination can be made concerning the validity of the IRS's

actions in forcing this action into the Tax Court. Petitioners have alleged in their civil action in federal district court that the IRS is retaliating against petitioners' exercise of their constitutionally protected rights of association and speech. If the proceedings in the Tax Court are allowed to proceed, the goal of the conspiracy will be substantially attained, and as in *Steelman*, the petitioners "may be helpless to vindicate [their] equities in the suit" in Arizona, *id.*, 310 U.S. at 286, or they may risk that "the investigation of the equities may be partial or abortive." *Id.*

Fortunately, the Constitution protects citizens against the tyranny inherent in allowing one branch of government to make the decision as to what the law will be, how it will be executed, and how it will be interpreted. Congress, *not* the Executive branch, has decided how tax disputes will be resolved. In developing the legislative scheme, Congress granted to the taxpayer, *not* the Executive branch, the decision as to which forum in which the litigation will proceed. While it is not uncommon for the taxpayer to choose to litigate in the Tax Court, the *decision must remain with the taxpayer.* Article III, Sec. 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional or executive attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating " constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. *Commodity Futures Trading Com'n v. Schor*, —— U.S. ——, 106 S.Ct. 3245, 3257, —— L.Ed.2d —— (1986). Illegal conduct within the Executive branch cannot be allowed to eliminate the taxpayer's constitutional and statutory right to choose. Such conduct effectively encroaches on the will of the legislative branch of our government by effecting a *de facto* amendment to the statute. Similarly, such conduct encroaches on the judicial branch of government by effectively removing from judicial review an area specifically within the judicial

power of the United States district courts. The delicate balance of the division of powers is too central to our constitutional scheme to risk its incremental erosion.

II. PETITIONERS' RIGHT TO A JURY TRIAL WILL BE LOST IF THE TAX COURT PROCEEDINGS ARE NOT STAYED

As the dissenting opinion of Justice Blackmun in *Laing, supra*, notes, if a taxpayer chooses to have his tax dispute adjudicated in a federal district court, he has the right to have the facts determined by a jury. On the other hand, a Tax Court determination does not carry with it the right to a jury trial. Petitioners made a timely demand for a jury trial in *Nordbrock v. Jensen* in the district court of Arizona. This Court has made clear that mandamus is appropriate when required to protect the right to a jury trial. The Second Circuit Court of Appeals has canvassed the relevant principles of the right to a jury trial in *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76 (2nd Cir. 1974):

> [O]ne who asserts the important right to a jury trial in a timely fashion is entitled to a stay of an earlier non-jury resolution of the issues which might collaterally estop exercise of his right to have them decided by the jury. . . .
>
> [T]he Supreme Court, in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), removed any doubt regarding the propriety of using mandamus to protect a litigant's right to a jury trial of issues, citing Judge Frank's decision in *Bereslavsky v. Caffey*, 161 F.2d 499 (2nd Cir. 1954). Indeed, in its later decision in *Dairy Queen v. Wood*, 369 U.S. 469, 92 S.Ct. 894, 8 L.Ed. 2d 44 (1960), the Court implied that it is our duty to grant mandamus in aid of that right, stating "Our decision [in *Beacon Theatres*] reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where

> necessary to protect the constitutional right to trial by the jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims."

Id., at 78. A determination by the Tax Court of the proper tax liability of petitioners would collaterally estop the relitigation of that issue, and thus deprive petitioners of their constitutional right to have the facts determined by a jury. The Constitution did not envision that the right to a jury trial would depend on the caprice of the executive branch of government. The intentional conduct on behalf of the executive branch, however, threatens to eviscerate the right to a jury trial unless this petition is granted and the writ issued.

CONCLUSION

The Ninth Circuit concluded in *United States v. Dahlstrom*, *supra*, that:

> These appellants were prosecuted in spite of the fact that no statute, regulation or court decision gave fair warning that advocacy of the creation of lawful foreign trust corporations as a tax shelter would result in a criminal prosecution if the challenged transaction might later be held to lack economic substance for purposes of a civil tax proceeding.
>
> Prosecution for advocacy of a tax shelter in the absence of any evidence of a specific intent to violate the law is offensive to the first and fifth amendments to the United States Constitution.

Id., at 1429. In the instant case, the IRS concededly had a duty to bring a civil challenge to a program it deemed to be an abusive tax shelter. But it had an overriding duty to do so within the bounds of law, which prohibits actions to deprive citizens of their constitutional and statutory rights to an Article III forum in which to have their disputes litigated, if they so choose. The IRS has

rigged the game. This Court cannot allow our constitutional protections to be subverted, regardless of the expedience or "good intentions" of the perpetrators.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-7091

TC# 21018-82, et al.

JIMMY L. STANDLEY, *et al.*,
Petitioners,

vs.

UNITED STATES TAX COURT,
Respondent,

and

COMMISSIONER OF INTERNAL REVENUE,
Real Party in Interest.

[Filed Mar. 23, 1987]

ORDER

Before: GOODWIN, SCHROEDER and POOLE, Circuit Judges

Taxpayers' petition for a writ of mandamus to stay trial proceedings in the tax court is denied.

MoCal 3/16/87

APPENDIX B

UNITED STATES TAX COURT

Docket Nos. 21018-82; 6077-83; 6123-83; 8372-83; 5462-84; 17828-84; 17974-84; 18116-84; 19307-84; 20874-84; 25514-85; 25515-85; 25516-85; 40740-85; 40741-85; 40742-85; 40743-85; 22441-86

JIM STANDLEY and SHARON F. STANDLEY, *et al.*,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

[Filed Jan. 30, 1987]

MOTION FOR CONTINUANCE

Petitioners, by and through their attorney, William A. Cohan, of the Colorado law firm of Cohan & Stahl, P.C., pursuant to Tax Court Rule 134, hereby move this Honorable Court for a stay or continuance of trial proceedings in the above docketed matters pending disposition in the United States District Court for the District of Arizona, Case No. CIV-85-687-PHX-CLH, of constitutional tort claims based upon fraudulent notices of deficiency by which this Court's jurisdiction was imposed upon petitioners, as set forth in the accompanying Memorandum of Points and Authorities in support of this Motion.

1. On December 10, 1986, this Honorable Court issued an Order setting the above-docketed cases for trial at a

Special Trial Session of the Court beginning on April 20, 1987 at 10:00 o'clock a.m.

2. Petitioners' counsel William A. Cohan received said Order on January 5, 1987. *See* Copy of Order, Exhibit "A", attached hereto.

3. Petitioners' Motion is timely as set forth in Rule 134, U.S.T.C.

4. Petitioners' have not submitted this Motion in bad faith nor for a dilatory purpose.

5. Petitioners have cooperated and intended to continue to fully cooperate with respondent in substantiation and discovery matters.

6. Respondent will not be prejudiced if this Court grants petitioners' Motion to Stay pending disposition of Case No. CIV-860687-CLH-PHX in the United States District Court for the District of Arizona.

7. Respondent objects to this Motion.

RESPECTFULLY SUBMITTED this 29th day of January, 1987.

COHAN & STAHL, P.C.

By: /s/ William A. Cohan
WILLIAM A. COHAN
Counsel for Petitioners
1801 York Street
Denver, Colorado 80206
(303) 623-4350

STAMPED
U.S. Tax Court
DENIED
February 6, 1987
/s/ John J. Pajak
Special Trial Judge

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of January, 1987, I did deposit in the United States mail, at Denver, Colorado, a true and correct copy of the foregoing, Motion for Continuance, with sufficient postage affixed thereto, addressed as follows:

Robert A. Johnson
I.R.S. District Counsel
3225 N. Central Avenue, Suite 1500
Phoenix, Arizona 85012

JOHN J. STANDIFER, JR.
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100 N. Stone Avenue, Suite 1005
Tucson, Arizona 85701

/s/ [Illegible]

EXHIBIT "A"

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Docket No. 21018-82; 6077-83; 6123-83; 8372-83; 5462-84; 17828-84; 17974-84; 18116-84; 19307-84; 20874-84; 25514-85; 25515-85; 25516-85; 40740-85; 40741-85; 40742-85; 40743-85; 22441-86

JIM STANDLEY and SHARON F. STANDLEY, *et al.*,
Petitioner,

v.

COMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

For cause, it is,

ORDERED that these cases are set for trial at a Special Trial Session of the Court beginning on April 20, 1987 at 10:00 a.m. in Room 235, Federal Building and United States Post Office, 522 North Central Avenue, Phoenix, Arizona 85004. This order constitutes official notice to the parties of the aforesaid trial.

/s/ John J. Pajak
JOHN J. PAJAK
Special Trial Judge

Dated: Washington, D.C.
December 10, 1986

APPENDIX C

Internal Revenue Code of 1954:

26 U.S.C. Sec. 161. ALLOWANCE OF DEDUCTIONS

In computing taxable income under section 63, there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

26 U.S.C. Sec. 162. TRADE OR BUSINESS EXPENSES

(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * *

26 U.S.C. § 163. INTEREST

(a) General rule.—There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

* * * *

26 U.S.C. § 164. TAXES

(a) General rule.—Except as otherwise provided in this section the following taxes shall be allowed as deduction for the taxable year within which paid or accrued:

(1) State and local, and foreign, real property taxes.

* * * *

(4) State and local general sales taxes.

* * * *

In addition, there shall be allowed as a deduction State and local, and foreign, taxes not described in the preceding sentence which are paid or accrued within the taxable year in carying on a trade or business or activity described in section 212 (relating to expenses for production of income).

* * *

26 U.S.C. § 165. LOSSES

(a) General rule.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * * *

26 U.S.C. § 166. BAD DEBTS

(a) General rule.—

(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

(2) Partially worthless debts.—When satisfied that a debt is recoverable only in part, the Secretary may allow such debt, in an amount not in excess of the part charged off within the taxable years, as a deduction.

* * * *

26 U.S.C. § 167. DEPRECIATION

(a) General rule.—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * *

26 U.S.C. § 6213. * * * PETITION TO TAX COURT

(a) Time for filing petition and restriction on assessment.—Within 90 days * * * after the notice of deficiency authorized in section 6212 is mailed * * * the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. * * *

* * * *

26 U.S.C. § 7422. CIVIL ACTIONS FOR REFUND

(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7442. JURISDICTION

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926.

28 U.S.C. § 1346. UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * *

Supreme Court, U.S.
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No. 86-2042

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

JIMMY L. STANDLEY, ET AL., PETITIONERS

v.

UNITED STATES TAX COURT
(COMMISSIONER OF INTERNAL REVENUE,
REAL PARTY IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in refusing to issue a writ of mandamus requiring the United States Tax Court to stay proceedings in cases brought by petitioners for redetermination of their tax liabilities, pending resolution of another lawsuit brought by petitioners in another court seeking damages and injunctive relief.

1. a. The individual petitioners are members of the American Law Association (ALA), an organization created as part of a tax shelter scheme that utilized foreign trusts to attempt to evade federal income taxes. See generally *United States* v. *Dahlstrom*, 713 F.2d 1423, 1425-1426 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984). The other petitioners are foreign trusts formed by the individual petitioners as part of that scheme. Both the Ninth Circuit and the Tax Court have held that such foreign trusts are ineffective to shift income from the creator to the nontaxable foreign trusts. *Akland* v. *Commissioner*,

767 F.2d 618 (1985); *Zmuda* v. *Commissioner*, 731 F.2d 1417 (1984); *Professional Services* v. *Commissioner*, 79 T.C. 888 (1982).

The Internal Revenue Service (IRS) examined petitioners' income tax returns and determined deficiencies in income tax against each of the petitioners. Each petitioner filed a petition with the United States Tax Court seeking a redetermination of the deficiencies asserted by the IRS. The Tax Court has consolidated all the petitioners' cases for trial, and that trial is now scheduled for November 2, 1987.

b. Petitioners, and others, filed a separate suit in the United States District Court for the District of Colorado seeking damages and injunctive relief against various named and unnamed employees of the IRS and the Department of Justice. That lawsuit was transferred to the District of Arizona, where it is now pending (*Nordbrock* v. *Jensen,* No. CIV-86-687-PHX-CLH). Petitioners alleged in the complaint that the defendants had unlawfully conspired against them to deprive them of various constitutional and statutory rights, including, *inter alia*, their First, Fourth, and Fifth Amendment rights and their right to a jury trial to determine the correct amount of their federal tax liabilities. See C.A. Pet. for Writ of Prohibition and/or Writ of Mandamus (Mandamus Pet.), Exh. H. The latter claim rested on an allegation that the defendants had inflated the amount of the asserted deficiencies in excess of the true tax liabilities, yielding an amount that the petitioners could not pay. Petitioners contended that this alleged conspiracy deprived them of their right to pay the full amount of the deficiencies and to litigate the correctness of the assessment in a refund suit in federal district court or the Claims Court. See Mandamus Pet. at 10, 12.

c. On January 30, 1987, petitioners filed a motion seeking a continuance of the Tax Court trial (then sched-

uled for April 20, 1987) until resolution of their damage suit in the district court. See Mandamus Pet., Exh. A. The Tax Court denied the motion on February 6, 1987. On March 6, 1987, petitioners filed a Petition for Writ of Prohibition and/or Writ of Mandamus with the court of appeals seeking an order directing the Tax Court to stay its trial proceedings. Petitioners asserted that they would suffer irreparable injury if the Tax Court proceedings were not stayed because an unfavorable decision in that court might have an adverse collateral estoppel effect on their pending damage action in the district court. Petitioners argued that this eventuality would deprive them of their right to have a jury determine their right to damages. See Mandamus Pet. at 21-25. The court of appeals denied the petition on March 23, 1987 (Pet. App. 1a).

2. The court of appeals correctly denied the petition for a writ of mandamus or prohibition, and there is no reason for this Court to review that denial. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. * * * [T]he writ 'has traditionally been used in federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." ' " *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976) (citations omitted); see also *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U.S. 33, 34-35 (1980); *Will* v. *United States,* 389 U.S. 90, 95 (1967). Moreover, the party seeking mandamus must demonstrate that his right to the writ is "clear and indisputable." *Kerr,* 426 U.S. at 403; *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 384 (1953).

Petitioners plainly fail to satisfy these requirements. They do not—and cannot—maintain that the Tax Court would exceed its jurisdiction in proceeding to trial on the issues raised by petitioners' petitions in that court; nor do they contend that the Tax Court has an absolute duty to

grant petitioners' request for a continuance. On the contrary, the Tax Court's exercise of its discretion to control its own docket is a matter that "ought not to be overridden by a writ of mandamus. Where a matter is committed to the discretion of a * * * [trial] court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 665-666 (1978) (plurality opinion (footnotes omitted)).

In any event, the reasons urged by petitioners in seeking a writ of mandamus provided little basis for the Tax Court to grant a continuance. The Tax Court's jurisdiction, with certain exceptions not pertinent here, is limited to determining deficiencies or overpayments in tax. See Sections 6214 and 6512(b) of the Internal Revenue Code (26 U.S.C.). Accordingly, the Tax Court's decisions in petitioners' consolidated cases will not resolve the allegations made in petitioners' suit for damages against individual employees of the IRS and the Department of Justice, which is founded on the claim that these individuals conspired to deprive petitioners of various constitutional and statutory rights. See Mandamus Pet., Exh. H.* Thus, the Tax Court acted quite reasonably in denying petitioners' request for a continuance, and there is no reason whatsoever for this Court to review the court of appeals' refusal to issue an extraordinary writ directing the Tax Court to stay the trial.

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* We note that petitioners' claim that being forced to litigate in the Tax Court would deprive them of a "constitutional right to have the facts determined by a jury" (Pet. 12) is misconceived. It has long been established that there is no *constitutional* right to a jury trial in a suit against the United States. See *Galloway* v. *United States*, 319 U.S. 372, 388 (1943); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). The right to a jury trial to which petitioners allude, *i.e.*, in a tax refund suit brought in federal district court against the United States (see 28 U.S.C. 2402), is a statutory right conferred by Congress in 1954. See Act of July 30, 1954, ch. 648, 68 Stat. 589.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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